Supreme Court, U. S.
FILED
MAR 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Misc. No. 76-1235

ROBERT LEE MITCHOM,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

NORMAN S. LONDON
LAWRENCE J. FLEMING
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	3
A. Conviction and Sentence	3
B. Summary of Record	3
Reasons for Granting the Writ	8
1. Guidance Is Needed From This Court in Order to Resolve the Conflicting Standards and Definitions of "Materiality" Applied by the Various Circuits to Prosecutions Under 18 U.S.C. § 1623	8
Conclusion	15
Appendix	A-1
Exhibit A	A-1
Exhibit B	A-6

Cases Cited

Barns v. United States, 378 F.2d 646 (5th Cir. 1967)	13
Bowers v. United States, 202 F.2d 447 (D.C.Cir. 1953)	12
Dolan v. United States, 218 F.2d 454 (8th Cir. 1955), cert. denied, 349 U.S. 923	8, 9

Harrell v. United States, 220 F.2d 516 (5th Cir. 1966) .. 13

LaRocca v. United States, 337 F.2d 39 (8th Cir. 1964) .. 9

Masinia v. United States, 296 F.2d 871 (8th Cir. 1961) 8

Sinclair v. United States, 279 U.S. 263 (1929) 8

United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971) 9, 12

United States v. Kelly, 540 F.2d 990 (9th Cir. 1976) 14

United States v. Koonce, 485 F.2d 374 (8th Cir., 1973) .. 8, 9

United States v. Lasater, 535 F.2d 1041 (1976) 8, 9, 10

United States v. Lococo, 450 F.2d 1197 (9th Cir. 1971) .. 14

United States v. Percell, 526 F.2d 189 (9th Cir. 1975) .. 14

United States v. Whimpy, 531 F.2d 768 (5th Cir. 1976) 12, 13

Statutes Cited

2 U.S.C. § 192 12

18 U.S.C. § 1621 .....12, 13, 14

18 U.S.C. § 1623 .....2, 3, 8, 9, 12

18 U.S.C. § 1951 3

28 U.S.C. § 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Misc. No. .....

ROBERT LEE MITCHOM,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 26, 1976.

OPINION BELOW

The opinion of the Court of Appeals is unpublished, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1976, and a Petition for Rehearing was denied on January 4, 1977. On January 24, 1977 this Court entered an

order extending the time to file a petition for Writ of Certiorari to and including March 5, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is "materiality" in a prosecution under Title 18 United States Code § 1623 proven by a mere showing that the defendant's statement was "in relation to" a matter under investigation by the grand jury or is it necessary to show that the defendant's statement tended to "influence, mislead or hamper" the grand jury's investigation of a matter which is within its authority to investigate?

2. Is an indictment under Title 18 United States Code § 1623 sufficient if it merely charges that the defendant's declaration was "with respect to a material matter" or must it charge that the declaration itself was "material" to a legitimate inquiry of the grand jury.

STATUTE INVOLVED

United States Code, Section 1623. False declarations before grand jury or court.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned no more than five years or both.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

STATEMENT

A. Conviction and Sentence.

This is an appeal from the judgment, conviction and sentence of the United States District Court for the Eastern District of Illinois, wherein the defendant was convicted of one count of violating Title 18 United States Code § 1623 which prohibits the making of a "false material declaration" before a grand jury.

Appellant Mitchom was sentenced to imprisonment for a term of four months with thirty-two months on probation together with a fine of $2500.00.

The United States Court of Appeals for the Seventh Circuit affirmed the conviction.

B. Summary of Record.

The indictment herein charged a single count of making a false statement under oath *"with respect to* (emphasis added) a matter which was material to the grand jury investigation." (Indictment, par. 3 and 4; Government's Appellate Brief, p. 19). According to the indictment, the grand jury was conducting an investigation of possible violations of the Hobbs Act, 18 U.S.C. § 1951, and "it became and was material for the grand jury to determine if any contractors had 'laundered' any funds for the purpose of paying kickbacks to public officials."

Petitioner was a general contractor engaged in the construction of the Centerville, Illinois City Hall. According to the Government's evidence, a Government informant, Marvin Schwartz, who was a subcontractor in the construction of the City Hall, was told by petitioner to add some $20,000.00 to an invoice for work performed. Petitioner, then, in his capacity

as general contractor was to have written out a check for this greater amount, have Marvin Schwartz cash said check, and then receive back from Marvin Schwartz an amount of approximately $18,000.00 from the proceeds. According to the Government's theory, this amount was to be forwarded as a kickback to a public official. According to the Government's evidence this alleged scheme was accomplished under the control and surveillance of the F.B.I.

Despite the fact that the F.B.I. was fully aware of the alleged transaction between its informant Marvin Schwartz and petitioner, the petitioner was subpoenaed before the grand jury and asked numerous questions about his dealings with Schwartz.

Although no specific testimony is set out in the indictment, the portion of petitioner's grand jury testimony which apparently served as the basis for the indictment was:

"Q. Did you ever get any of that twenty-two thousand three hundred dollars ($22,300.00) back from Marvin Schwartz?

A. No, sir."

(Transcript, Grand Jury Testimony, Robert Mitchom, September 17, 1975; *See* Government's Appellate Brief, pp. 5-6.)

Ostensibly on the question of how the petitioner's testimony was "material," as that phrase has been defined, the Government produced the United States Attorney Henry Schwarz who testified in pertinent part as follows:

"Q. Now, sir, you related that you were investigating public officials and the construction of public projects. On September 17th were you in fact investigating public corruption with reference to Centerville City Hall?

A. That is correct.

Q. And that would be with reference to the construction of that project—is that not correct?

A. Yes, sir.

Q. And, sir, to your knowledge, did Mr. Robert Mitchom testify before the Grand Jury of that date?

A. Yes, he did.

Q. And that testimony was with reference to matters that you have just set forth?

A. That's right.

Mr. Nester: I have no further questions of this witness, Your Honor." (Transcript pp. 43-44.)

The United States Attorney therefore, testified merely that the testimony of the petitioner was "with reference" to the matter under investigation by the grand jury investigation. At no time did he explain *how* petitioner's declarations were material in the sense that they tended to influence, mislead or hamper the grand jury in its investigation. Although the grand jury was investigating public construction contracts, there was no showing that the building in question was a public building or that any public official had anything to do with the building or that the funds used in construction were public. These were apparently presumed to be true. But in fact they were not. (Transcript p. 215; *See* Petitioner's Appellate Brief, p. 10.) The building is a private building built with funds from a private non-for-profit corporation, the Centerville Public Building Corporation. No public official had any discretionary vote over the use of the funds or decision making authority so far as change orders or related matters were concerned. (Transcript, p. 214; *See* Petitioner's Appellate Brief, pp. 9-10.) The questions asked petitioner dealt with a *private* account, a *private* contractor, and a *private* subcontractor.

Nowhere was evidence produced that the allegedly false statements mislead or hampered the grand jury's investigation or

that they tended to do so. Through the use of F.B.I. surveillance and informant Marvin Schwartz, the Government already knew the answers to the questions before they were asked. During petitioner's grand jury testimony, the Government's attorneys stated:

> "[W]e had knowledge that you lied before this Grand Jury. We had information that the statements that you gave before this Grand Jury were false . . . that we are aware of the false statements."

(Transcript, Grand Jury Testimony, Robert Mitchom, September 17, 1975, p. 27). Nowhere is it explained *how*, in view of the fact that the Government knew the answers, the allegedly false testimony of petitioner even had the "potential" to mislead the grand jury or hamper its investigation.

No other evidence was produced on the issue of materiality, however, the Court overruled defendant's motion for judgment of acquittal, saying:

> "The Court: I think that the questions that are asked generally in the Grand Jury of Mr. Mitchom were material to the government's investigation which is what I just said. Both the Hobbs Act violation and possible income tax violation.
>
> Mr. Wheadon: Would that include, Your Honor, a finding that . . . as it relates to materiality . . . that the building, the check, or anything concerning it fell within Section 1951 of the Hobbs Act?
>
> The Court: I will say that I don't feel that the government had to prove that at this point." (T. 238)

The Court later instructed the jury in pertinent part as follows:

> The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned,

> but rather it is a question for the Court to decide. You are instructed that the questions asked the accused before the grand jury as charged in this indictment, constituted material matter in the grand jury proceeding described in the indictment. (T. 321)

The petitioner was convicted by the jury and sentenced by the Court as indicated. The Court of Appeals rejected petitioner's arguments that "materiality" was not adequately alleged or proved and sustained defendant's conviction.

REASONS FOR GRANTING THE WRIT

1. Guidance Is Needed From This Court in Order to Resolve the Conflicting Standards and Definitions of "Materiality" Applied by the Various Circuits to Prosecutions Under 18 U.S.C. § 1623.

It is clear from the language of the statute that for the offense of perjury to lie, the declaration made must be material. 18 U.S.C. 1623(a). It is also clear that the question of whether a statement is material is one of law for the courts to decide. *Sinclair v. United States*, 279 U.S. 263, 298 (1929); *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir., 1973); *Masinia v. United States*, 296 F.2d 871, 874 (8th Cir. 1961); *Dolan v. United States*, 218 F.2d 454 (8th Cir. 1955), cert. denied, 349 U.S. 923.

What is not clear and what will remain unclear until determined by this court, is what the appropriate standard for determining the question of materiality should be. For example, the Eighth Circuit and Second Circuit apparently apply a much more stringent standard than do the Seventh and Ninth Circuits.

The recent Eighth Circuit case of *United States v. Lasater*, 535 F.2d 1041, 1049 (1976), qualifies that concept by noting that:

> ". . . Congress has manifested its intent that the serious sanction of a perjury conviction be imposed only if the false testimony in fact tends to impede the grand jury. To allow the perjury statute to be invoked where the alleged misstatement relates only to a peripheral matter would unwisely expand the statute's scope. It would render the measures taken against the offense 'so severe as to discourage witnesses from appearing or testifying.' Bronston v. United States, 409 U.S. 352, 259 (1973)."

The Court of Appeals for the Eighth Circuit has repeatedly enunciated its standard for determining materiality to be a "[d]eliberate false swearing before a grand jury, tending to influence, mislead or hamper its investigation of a matter which it has authority to investigate . . ." *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *Dolan v. United States*, 218 F.2d 454 (8th Cir. 1955); *See* also *LaRocca v. United States*, 337 F.2d 39, 43 (8th Cir. 1964).

Koonce went on to say that because materiality is an essential element of 18 U.S.C. § 1623(a) "[i]t is incumbent upon the government at trial to prove the materiality of defendant's statements before the grand jury." *supra* at 381, citing *United States v. Freedman*, 445 F.2d 1220, 1227 (2d Cir. 1971).

That a mere allegation of materiality is insufficient in the Eighth Circuit to convict under 18 U.S.C. § 1623 was again demonstrated in the *Lasater* case, *supra*. The indictment in *Lasater*, which involved a grand jury investigation of alleged illegal campaign contributions to former governor Warren Hearnes, stated that the defendant's statements were made "with respect to" questions "material to the grand jury investigation." 535 F.2d at 1046. In affirming the district court's dismissal of the indictment, the Court of Appeals reiterated the findings of that lower court:

> "[T]he answers given to the grand jury did not 'tend to influence, mislead or hamper the grand jury in its investigation . . .'; thtat the documentary evidence already before the grand jury was suffiicent to show 'how the payments were in fact made by Mercantile to Conran; that the questions appearing in the indictment 'were not calculated to develop precise and specific information *which would have assisted the grand jury* (emphasis added); that White's [Assistant U. S. Attorney] assertion that he had been misled and the grand jury hindered should be rejected as conclusory; and that the answers given did not *in fact* (em-

phasis added) impede the Assistant U. S. Attorney from asking whatever question he may have wanted to ask.' "

535 F.2d at 1046.

Moreover, the standard enunciated by the Eighth Circuit requires that the testimony be material to the issues actually under investigation by the grand jury rather than to all those matters which the grand jury is competent to hear. This is evident by the *Lasater* Court's conclusion as to Count I (relating to the authorship of the letter of guarantee) that:

> "The only thing concealed by Lasater's false testimony (if indeed it was false) was the extent of his own part in arranging the guarantee. While it might have been material to an investigation of Laster's actions, *it was clearly not material to this investigation of Warren Hearnes* (emphasis added.)" 535 F.2d at 1048.

In finding that Lasater's statements were not material, the Court said that the Government *had not shown* how the statements impeded the investigation of Hearnes' alleged offenses. 535 F.2d at 1049.

As in the *Lasater* case, the indictment in the instant case did not allege that the petitioner's statements themselves were "material" to the grand jury's investigation, but only that the statements were made "with respect to a matter which was material to the grand jury's investigation". That this distinction is not merely one of semantics is apparent when it is noted that in the *Lasater* case the defendant's statements may well have been "with respect to" a material matter, but the trial court and Court of Appeals found that the statements themselves were not shown to be "material" under the standards promulgated in the Eighth Circuit since they were not shown to have a "tendency to influence, mislead or hamper the grand jury in its investigation."

Similarly, in the instant case the United States Attorney testified that petitioner's statements were "with reference" to matters under investigation by the grand jury but there was no testimony or other evidence as to how the statements tended to impede, mislead or hamper the grand jury's investigation. It is also apparent that the trial judge in ruling on the issue of materiality did not believe such evidence was required. The trial court noted that "the *questions* asked *generally* in the Grand Jury of Mr. Mitchom were material to the government's investigation" and further in instructing the jury the trial court said "You are instructed that the *questions* asked the accused before the grand jury as charged in this indictment constituted material matter." The trial court apparently felt that if the questions generally pertained to the matter under investigation then the defendant's answers thereto were "material", therefore totally ignoring the need "for a showing that the testimony tends to impede, mislead or hamper the grand jury".

As a matter of fact, as in the *Lasater* case, the evidence in the instant case indicated that the Government was well aware of the facts alleged to be true. The principal witness, Marvin Schwartz, was cooperating with the F.B.I. at the time the transactions involving petitioner took place, and was, in fact, not in any way misled, impeded or hampered.

Moreover, in the case at bar, the defendant's allegedly false statements related to his own actions and not to those of a public official. The defendant's statements related to a private building built through a private contract, not a public building built via a public contract. The matter specifically under the grand jury's inquiry was alleged to be "kickbacks" to *public officials* with respect to *public contracts*. It would appear that Mitchom's statements might be material to an investigation of *his* actions, but not those of a public official.

However, the Court of Appeals for the Seventh Circuit, affirming the petitioner's conviction, obviously applied a standard

somewhat more loose than that applied in *Lasater*. Citing *United States v. Whimpy*, 531 F.2d 768 (5th Cir. 1976), the Court states:

> "We do not recommend that the indictment be used as a model, but it is adequate as it alleges all of the statutory elements of the crime that the defendant was under oath, before the grand jury, knowingly made a false statement which is identified, and that it was a material matter to the investigation, the general nature of which is set forth."

The Court of Appeals holding that the "materiality" of defendant's statements need not be *proved* said that the "United States Attorney testified and explained what was under investigation and that the defendant's testimony was *in relation to it.* (emphasis added)" Such a standard is in contrast not only to that applied in the Eighth Circuit, but also to that applied in the D.C. Circuit and the Second Circuit.

On an issue pre-dating but closely related to false testimony under 18 U.S.C. § 1623, the Court in *Bowers v. United States*, 202 F.2d 447 (D.C.Cir. 1953) reversed a conviction under 2 U.S.C. § 192 for refusal to testify before a Senate committee investigating organized crime in interstate commerce on the basis that the Government had not proven the "pertinency" of the questions as required by statute. The Court stated that "the pertinency of the question is an essential ingredient of the offense, and one may not be convicted of violating the statute unless the Government shows the question he refused pertained to some matters being investigated." 202 F.2d at 448.

Expanding upon this concept, the Court in *United States v. Freedman*, 445 F.2d 1220 (2d Cir. 1971), reversed a conviction under 18 U.S.C. § 1621 (where the issue of materialty is identified). Responding to the prosecution argument that a statement is material if its "natural effect or tendency" is "to

influence, impede or dissuade" further investigation, the Court held:

> The Government's analysis ignores . . . what we perceive to be a second essential element in establishing materiality. . . . [T]he 'further investigation' of which they speak must have some probative value connected with the scope of the inquiry . . . *[I]t must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that as a minimum, further fruitful investigation would have occurred.*" (emphasis added) 445 F.2d at 1226-1227.

On the other hand, it would appear that at least two other Circuits apply a standard similar to that applied by the Seventh Circuit.

In the case of *United States v. Whimpy, supra*, cited in the decision of the Court of Appeals, it was stated that:

> "The case law has established very broad parameters to what is considered material and *essentially anything* (emphasis added) that could influence or mislead the trial court or the jury is considered to be material. (citation omitted) Since the false testimony was obviously designed to negate the conspiratorial nature of the previous prosecution and in addition had the ancillary effect of confusing the facts which were to be considered by the court and the jury, we hold that the testimony of Ms. Whimpy falls within the ambits of the statute." 531 F. 2d at 770.

With regard to a Section 1621 prosecution, which presumably requires the same standard of "materiality", the Fifth Circuit has held in *Barns v. United States*, 378 F.2d 646 (5th Cir. 1967) and *Harrell v. United States*, 220 F.2d 516 (5th Cir. 1966) that "every question upon cross-examination of a witness is said to be material".

An equally loose standard is expressed by the Court of Appeals for the Ninth Circuit. In *United States v. Percell*, 526 F.2d 189 (9th Cir. 1975), the Court upheld a finding of materiality and commented:

> "The only requirement is that the question be material to a subject of grand jury inquiry. The evidence need not be material to the main issue and it need not be directed to the primary subject of the investigation. It is material if it relates to any subsidiary issue then under consideration (citations omitted). It is not ever necessary for the government to prove the false declarations actually impeded the grand jury investigation." 526 F.2d at 190.*

This same standard of materiality was expressed by the Ninth Circuit with respect to a Section 1621 offense in *United States v. Lococo*, 450 F.2d 1197 (9th Cir. 1971).

Following *Percell* and *Lococo*, the Court in *United States v. Kelly*, 540 F.2d 990, 993 (9th Cir. 1976) held that "[i]t is sufficient for the government to prove that the testimony was relevant to any issue under consideration by the grand jury. If the falsity of the testimony would have the natural tendency to influence the grand jury's investigation, it is material." *Kelly*, however, acknowledged the Ninth Circuit's contradictory view of materiality as compared with that of the Eighth Circuit in the *Lasater* case and stated:

> "To the extent that *Lasater* advocates a more restrictive view of materiality in perjury prosecutions, than does *Lococo*, we prefer the rational of the *Lococo* case." (570 F.2d 993 N. 9).

---

* Compare this statement with that of the Eighth Circuit in *Lasater, supra*, pp. 8, 9, 10.

CONCLUSION

It is apparent therefore that conflicting standards of materiality are applied in different Federal Circuits and, consequently, a uniform standard is necessary to assure equal protection of the law. This can and should be accomplished through the plenary consideration by this Court of the issues raised in the instant case. For this reason, this Petition for Certiorari should be granted.

Respectfully submitted,

LONDON, GREENBERG & FLEMING

NORMAN S. LONDON
LAWRENCE J. FLEMING
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Petitioner

APPENDIX

EXHIBIT A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 5, 1976

November 26, 1976

Before

Hon. William J. Bauer, Circuit Judge

Hon. Harlington Wood, Jr., Circuit Judge

Hon. S. Hugh Dillin, District Judge*

United States of America, Plaintiff-Appellee, No. 76-1274 v. Robert Lee Mitchom, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois. No. CR-74-90-E James L. Foreman, Judge.

Order

By indictment on October 30, 1975, naming only the defendant, it was alleged in substance that the defendant had knowingly made a false material statement before the grand jury in a pending investigation as to possible violation of § 1951, Title

---

* The Honorable S. Hugh Dillin, District Judge of the Southern District of Indiana, is sitting by designation.

18 U.S.C. (Hobbs Act); that it was material to determine if any contractors had "laundered" any funds for purposes of paying kickbacks to public officials; and that the defendant under oath denied that he received any of the $22,300.00 back from Marvin Schwartz.

After a two-day trial by jury the defendant was found guilty and sentenced to imprisonment for a term of three years on condition that he be confined in a jail type institution for four months with the remainder on probation. In addition he was fined $2,500.00.

The factual background may be briefly stated.

The grand jury was investigating possible kickbacks to certain public officials in connection with the award of public construction contracts. The evidence showed that the defendant was a general contractor whose company was the general contractor for Centerville City Hall. Schwartz, not named in the indictment, was a subcontractor on the same project. In April, 1974, Schwartz submitted an invoice to the defendant for $2,319.75 and was told by the defendant to increase it by $20,000.00 and to return the extra money to the defendant. Schwartz, who was cooperating with the F.B.I., returned only $18,000.00. Some of his conversations with the defendant in connection with this transaction were recorded.

When the defendant was called before the grand jury in September, 1975, and asked about this kickback, he explicitly denied that he had received any part of the payment, but the defendant claimed to have considerable difficulty with his memory and needed to consult his records. He was allowed substantial time to do that. After returning to the grand jury he was given a fair chance to recant his testimony, but only reaffirmed it. At that time the grand jury transcript reveals that the defendant declined to change his previous answers that the payment of $22,300 to Schwartz was strictly for services,

that none of the money was to be a kickback to the Mayor, and finally,

> Q. "Question: Did you get any of that $22,300 back from Marvin Schwartz?"
>
> "Answer: No, sir."
>
> Do you want to change that?
>
> A. I don't want to change that.

The defendant was allowed complete discovery, which included transcripts of his grand jury testimony and the recordings of his conversations with Schwartz.

On appeal the defendant raises six issues which may be summarized and combined as follows: Were the factual allegations of the indictment adequate to charge the alleged violation, including in particular the materiality of the defendant's statements; whether materiality was proved; whether the grand jury questioning was sufficiently clear and concise; whether the defendant recanted his prior false answers; and whether the delay of a few days in the filing of a Government response to defendant's Motion to Dismiss was prejudicial.

We find all of the defendant's claims to be without merit. We do not recommend that the indictment be used as a model, but it is adequate as it alleges all of the statutory elements of the crime, that the defendant was under oath, before the grand jury, knowingly made a false statement which is identified, and that it was a material matter to the investigation, the general nature of which is set forth. *United States v. Whimpy*, 531 F.2d 768 (5th Cir. 1976).

The allegations are plain and concise enough to meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. The Supreme Court quoted with approval in *Russell v. United States*, 369 U.S. 749, 763 (1962), the following from

Smith v. United States, 360 U.S. 1, 9 (1959): "Convictions are no longer being reversed because of minor or technical deficiencies which resulted in no prejudice to the defendant." Then, at 369 U.S. 763, the Court set out the general criteria for judging the sufficiency of the indictments:

> . . . first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " and secondly, " 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34." *Hagner v. United States*, 285 U.S. 427, 431.

It is well settled that the specific matter of materiality is sufficiently alleged "by a single allegation of materiality rather than by the allegation of facts which, if true, show materiality." *United States v. Rook*, 424 F.2d 403, 405 (7th Cir. 1970).

The matter of materiality was also sufficiently proved. The United States Attorney testified and explained what was under investigation and that the defendant's testimony was in relation to it. An examination of the proceedings makes the materiality of the defendant's responses to the grand jury obvious.

Nor was the critical question asked the defendant before the grand jury so vague or misleading as to mislead or confuse the defendant or to make an unconditional answer impossible. The question set out above was clear enough and the answer unequivocal. The defendant clearly reaffirmed that answer at a later grand jury session, rather than recanted it. His evasiveness in other responses can in no way be construed as an admission that his prior declaration was false.

The matter of the short delay in the filing of a Government pleading is a matter within the discretion of the trial judge. No

prejudice to the defendant resulting from the delay was alleged or shown.

The transaction and events about which the defendant testified falsely before the grand jury were convincingly proved by surveillance, the testimony of Schwartz, the other participant, and the recordings of the defendant's conversations at the time. In this case there is no need to invoke the doctrine that the evidence must be viewed in the light most favorable to the Government.

We find no error and affirm.

Affirmed.

EXHIBIT B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 4, 1977

Before

Hon. William J. Bauer, Circuit Judge

Hon. Harlington Wood, Jr., Circuit Judge

Hon. S. Hugh Dillin, District Judge*

United States of America,
Plaintiff-Appellee,

No. 76-1274 vs.

Robert Lee Mitchom,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois
No. CR-75-90-E
James L. Foreman, Judge

Order

On consideration of the petition for rehearing in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

---

* The Honorable S. Hugh Dillin, United States District Judge for the Southern District of Indiana, is sitting by designation.